



9110-04-P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG-2017-0172]

RIN 1625-AA00

Safety Zone; Pacific Ocean, Kilauea Lava Flow Ocean Entry on Southeast Side of Island of Hawaii, HI

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

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SUMMARY: The Coast Guard is extending, for an additional six months, the existing temporary safety zone surrounding the entry of lava from the Kilauea volcano into the navigable waters of the Pacific Ocean on the southeast side of the Island of Hawaii, HI.

The extension of this safety zone is necessary to protect persons and vessels from hazards associated with molten lava entering the ocean while the proposed rule is reviewed.

DATES: This rule is effective from September 28, 2017 through March 28, 2018.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to <https://www.regulations.gov>, type USCG-2017-0172 in the "SEARCH" box and click "SEARCH." Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Lieutenant Commander John Bannon, Waterways Management Division, Coast Guard; telephone: 808-541-4359, email: [John.E.Bannon@uscg.mil](mailto:John.E.Bannon@uscg.mil).

## SUPPLEMENTARY INFORMATION:

### I. Table of Abbreviations

BLS	Bureau of Labor Statistics
COTP	Captain of the Port
DHS	Department of Homeland Security
FR	Federal Register
NPRM	Notice of proposed rulemaking
§	Section symbol
OMB	Office of Management and Budget
RFA	Regulatory Flexibility Act
SNPRM	Supplemental notice of proposed rulemaking
TFR	Temporary final rule
U.S.C.	United States Code

### II. Background Information and Regulatory History

The Coast Guard is extending, for an additional six months, an existing temporary safety zone for the navigable waters surrounding the entry of lava from the Kilauea Volcano into the Pacific Ocean on the southeast side of the Island of Hawaii, HI. Extending this safety zone ensures mariners remain safe from the potential hazards associated with molten lava entering the ocean while the proposed rule is being reviewed. This safety zone will continue to encompass all waters within 300 meters (984 feet) of all entry points of lava flow into the ocean. Because the entry points of the lava vary, the safety zone location will also vary. Entry of persons or vessels into this safety zone remains prohibited, unless specifically authorized by the Captain of the Port (COTP) Honolulu, or his designated representative.

Lava flow that enters the ocean can be potentially hazardous to anyone near it, particularly when lava deltas collapse. A lava delta is new land that forms when lava accumulates above sea level, and extends from the existing base of a sea cliff. Persons near active lava flow entry sites incur potential hazards, particularly when lava deltas

collapse. These hazards include, but are not limited to, plumes of hot, corrosive seawater laden with hydrochloric acid, and fine volcanic particles that can irritate the skin, eyes, and lungs; explosions of debris and eruptions of scalding water from hot rock entering the ocean; sudden lava delta collapses; and waves associated with these explosions and collapses.

Lava has been entering the ocean at the Kamokuna lava delta on Kilauea Volcano's south coast since July 2016. On December 31, 2016, a large portion of lava delta collapsed into the ocean at the Kamokuna entry point. Following this collapse, portions of the adjacent sea cliff fell into the ocean, producing localized waves, and showers of debris. As of March 2017, a new delta has begun to form at the Kamokuna ocean entry point. This lava delta continues to grow and collapse, and cracks parallel to the sea cliff surrounding it persist, indicating further collapses may occur with little or no warning.

On March 28, 2017, the Coast Guard established a temporary final rule (TFR) and put into place a safety zone for mariners near lava entry points to address the hazards of the lava entering the ocean. The TFR discussed Sector Honolulu's review of nearly 30 years of delta collapse and ejecta distance observations from the Hawaii Volcano Observatory records. The TFR was published in the April 3, 2017 Federal Register (82 FR 16109).

On April 3, 2017, the Coast Guard also published a notice of proposed rulemaking (NPRM) to establish a permanent safety zone that would encompass all waters extending 300 meters (984 feet) in every direction around all entry points of lava flow into the navigable waters surrounding the entry of lava from the Kilauea Volcano into the Pacific

Ocean on the southeast side of the Island of Hawaii, HI (82 FR 16142). We determined that a radius of 300 meters was a reasonable, minimum high-hazard zone around a point of active lava flow entering the ocean. The safety zone allows the Coast Guard to impose and enforce restrictions on vessels operating closely to the lava entry area, which protects persons and vessels from the potential hazards associated with molten lava entering the ocean. The NPRM addressed this concern and invited the public to comment on the safety zone. The comment period, which ended on June 2, 2017, received 67 comments. On May 8, 2017, at a public meeting held in Hilo, HI, meeting participants discussed the proposed rule and NPRM's public comments.

During the period of the TFR, four tour operators and one photographer with economic ties to lava tourism petitioned the COTP Honolulu for entry within 300 meters of the high-hazard zone. They also requested and petitioned for various levels of entry distances—ranging from a close, safe distance to 50 meters—based on sea conditions resulting from the lava entry. The COTP Honolulu granted express authorization for entry within 300 meters to the five operators. The authorization included operational restrictions and other vessel safety criteria requirements considered by the COTP Honolulu and will continue under the extended period of this TFR.

In order to review the overall impact of the final rule, a supplemental notice of proposed rulemaking (SNPRM) will be published, providing an additional 60 days for public comments and input. This TFR is necessary to promote navigational safety, provide for the safety of life and property, and facilitate the reasonable demands of commerce relating to tourism surrounding the lava entry points. It also provides an

opportunity for further comment from the public. Upon publication of the SNPRM, we will invite additional public comments on this rulemaking.

Under 5 U.S.C. 553(d)(3), the Coast Guard finds good cause exists for making this rule effective less than 30 days after publication in the Federal Register. Although we expect to review the SNPRM within 30 days of publication of this TFR, it would be impractical to delay the effective date of this rule. Immediate action is necessary to protect persons, vessels, and the public from the potential safety hazards associated with the ocean lava entry.

### III. Legal Authority and Need for Rule

The Coast Guard is issuing this rule under authority in 33 U.S.C. 1231. The COTP Honolulu has determined that potential hazards associated with Kilauea's active lava flow entry into the Pacific Ocean on the southeast side of the Island of Hawaii, HI is a safety concern for anyone within 300 meters (984 feet) in every direction around the entry of lava flow. The purpose of this rule is to ensure the safety of the public and vessels traveling in the navigable waters covered by the safety zone.

### IV. Discussion of Comments, Changes, and the Rule

This TFR extends the existing safety zone from September 28, 2017 through March 28, 2018, or until it is no longer necessary. If the safety zone terminates prior to March 28, 2018, the Coast Guard will provide notice via established notice to mariners.

In order to review the overall impact of the rule, the Coast Guard will publish an SNPRM providing an additional 60 days for comments on the proposed final rule. This TFR is necessary to promote navigational safety, provide for the safety of life and

property, and facilitate the reasonable demands of commerce relating to tourism surrounding the lava entry points.

## V. Regulatory Analyses

We developed this rule after considering numerous statutes and Executive orders related to rulemaking. Below we summarize our analyses based on a number of these statutes and Executive orders, and we discuss First Amendment rights of protestors.

### **A. Regulatory Planning and Review**

Executive Orders 12866 (“Regulatory Planning and Review”) and 13563 (“Improving Regulation and Regulatory Review”) direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select those approaches that maximize net benefits. Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. Executive Order 13771 (“Reducing Regulation and Controlling Regulatory Costs”), directs agencies to reduce regulation and control regulatory costs and provides that “for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.”

Under Executive Order 12866, this rule has not been designated a “significant regulatory action. Accordingly, the Office of Management and Budget (OMB) has not reviewed it. As this rule is a non-significant regulatory action, it is exempt from the requirements of Executive Order 13771. See OMB’s Memorandum titled “Interim Guidance Implementing Section 2 of the Executive Order of January 30, 2017 titled ‘Reducing Regulation and Controlling Regulatory Costs’” (February 2, 2017). A

regulatory analysis follows.

This TFR extends, for an additional six months, the existing safety zone for the navigable waters surrounding the entry of lava from Kilauea volcano into the Pacific Ocean. The safety zone will remain to include waters within 300 meters (984 feet) of where lava enters the ocean. Entry of persons or vessels into the safety zone may only occur if granted permission by the COTP Honolulu, or his designated representative.

Lava has been entering the ocean at Kamokuna on Kilauea Volcano's south coast since July of 2016 and will continue to do so in the future. When lava enters the ocean, new hazards emerge: plumes of corrosive seawater can irritate the skin, eyes, and lungs; explosions of debris and scalding water can injure passengers; sudden collapse of lava deltas can cause large waves potentially capsizing vessels. This TFR establishes a minimum safe operating distance in order to protect individuals and operators from the hazards of the Kilauea lava flow at sea.

This rule affects any vessel that would normally travel within 300 meters of points where lava reaches the ocean. Currently, four lava tour-boat operators have state licenses to operate from the Pohoiki Boat Ramp, the closest location to pick up passengers for tours of the Kilauea lava flow. The Coast Guard is also aware of one photographer who photographs the Kilauea lava flow. Since the implementation of the temporary safety zone, the COTP granted prior approval to these parties to enter the safety zone, so long as they comply with the conditions set by the COTP. These entities are required to notify the COTP by phone before each tour when entering the 300-meter safety zone.

When the Coast Guard published the original TFR on April 3, 2017, owners and operators were required to prepare and submit a written request to the COTP to enter the

safety zone. The TFR is a continuation of the requirements extending the safety zone for an additional six months, and therefore, we are presenting the costs associated with this TFR.

First, the captain of a lava tour boat will initiate the request to enter the safety zone through an initial written request to the COTP. Based on waiver requests from the four state-licensed operations, the Coast Guard estimates it takes about 4-hours for an owner or operator to submit a written request to enter the safety zone. This includes the time it would take lava tour-boat owners or operators to respond to questions from the COTP concerning the waiver request. Lava tour-boat owners or operators are only required to make this written waiver request once for consideration by the COTP.

We obtained the mean hourly wage rate for a Captain of a lava tour boat from the Bureau of Labor Statistics (BLS) Occupational Employment Statistics National Occupational Employment and Wage Estimates for May 2016. Based on BLS's data, the mean hourly wage rate for Captains, Mates, and Pilots of Water Vessels with the North American Industry Classification System (NAICS) occupational code of 53-5021 in the "Scenic and Sightseeing Transportation, Water" industry is \$24.42. Because this is an unloaded hourly wage rate, we added a load factor of 1.52 derived from the BLS March 2017 "Employer Cost for Compensation" databases to obtain a loaded hourly wage rate of \$37.12. We estimate the one-time initial cost for an owner or operator to prepare a written request and respond to comments from the Coast Guard to be about \$148.47 (\$37.12 per hour x 4 hours). We estimate the total cost of the temporary final rule to be about \$593.88 (\$148.47 x 4 lava tour-boat owners or operators).

Since all four tour operators and the photographer were each granted permission

to enter the safety zone through an initial waiver request, the only potential cost to these tour operators is the cost of the initial request. Each owner or operator also will be required to notify the COTP before entering the safety zone. These entities shall notify the Coast Guard by phone; however, we do not estimate a cost for the call because the equipment already exists onboard the vessel and operators will make their calls in the normal course of a Captain's duty.

The Federal Government also will incur costs of this temporary final rule. Government costs to implement the rule include the one-time cost of reviewing the waiver requests (we do not estimate a cost for the time to receive a call from an owner or operator to when entering a safety zone because the COTP conducts this review in the normal course of the COTP duties). To process the written request, we estimate one non-commissioned officer with a rank of E-7, and three officers with ranks of O-4, O-5, and O-6 will take about one hour each to review the written request. Based on the labor rates in table 1, we estimate the total cost to the Government of the temporary final rule to be about \$378.00. Table 1 below summarizes these Government costs.<sup>1</sup>

**Table 1: Total Government Costs of the Temporary Final Rule**

<b>Rank</b>	<b>Wage Rate</b>	<b>Labor Hours</b>	<b>Total Cost</b>
<b>E-7</b>	\$65	1	\$65
<b>O-4</b>	\$92	1	\$92
<b>O-5</b>	\$104	1	\$104
<b>O-6</b>	\$117	1	\$117

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<sup>1</sup> We obtained the hourly wage rates from Enclosure (2) of Commandant Instruction 7310.1R (29 March 2017) using the "In Government Rate".

<b>Total</b>	-	4	\$378
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We estimate the total cost of this temporary final rule to industry and the Government to be about \$972 (\$593.88 for lava tour-boat owners or operators + \$378 for the Government).

#### **B. Impact on Small Entities**

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601–612, as amended, requires Federal agencies to consider the potential impact of regulations on small entities during rulemaking. The term “small entities” comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000. Rules that are exempt from the Administrative Procedures Act include interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or when the agency for good cause finds that notice and comment are impracticable, unnecessary, or contrary to the public interest. When an agency is not required to publish an NPRM for a rule, the RFA does not require an agency to prepare a regulatory flexibility analysis. The Coast Guard was not required to publish an NPRM for this rule for the reasons stated in section II. “Background Information and Regulatory History” and therefore is not required to publish a regulatory flexibility analysis.

Under section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104-121), we want to assist small entities in understanding this rule. If the rule would affect your small business, organization, or governmental jurisdiction

and you have questions concerning its provisions or options for compliance, please contact the person listed in the FOR FURTHER INFORMATION CONTACT section.

Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by employees of the Coast Guard, call 1-888-REG-FAIR (1-888-734-3247). The Coast Guard will not retaliate against small entities that question or complain about this rule or any policy or action of the Coast Guard.

#### **C. Collection of Information**

This rule will not call for a new collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3520).

#### **D. Federalism and Indian Tribal Governments**

A rule has implications for federalism under Executive Order 13132, Federalism, if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. We have analyzed this rule under that Order and have determined that it is consistent with the fundamental federalism principles and preemption requirements described in Executive Order 13132.

Also, this rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the

Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes. If you believe this rule has implications for federalism or Indian tribes, please contact the person listed in the FOR FURTHER INFORMATION CONTACT section.

**E. Unfunded Mandates Reform Act**

The Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538) requires Federal agencies to assess the effects of their discretionary regulatory actions. In particular, the Act addresses actions that may result in the expenditure by a State, local, or tribal government, in the aggregate, or by the private sector of \$100,000,000 (adjusted for inflation) or more in any one year. Though this rule will not result in such an expenditure, we do discuss the effects of this rule elsewhere in this preamble.

**F. Environment**

We have analyzed this rule under Department of Homeland Security Management Directive 023-01 and Commandant Instruction M16475.1D, which guide the Coast Guard in complying with the National Environmental Policy Act of 1969 (42 U.S.C. 4321-4370f), and have determined that this action is one of a category of actions that do not individually or cumulatively have a significant effect on the human environment. This rule involves a temporary safety zone lasting 6 months that will prohibit persons and vessels from entry into the 300 meters (984 feet) safety zone extending in all directions around the entry of lava flow into the Pacific Ocean. This safety zone is categorically excluded from further review under paragraph 34(g) of Figure 2-1 of the Commandant Instruction. A Record of Environmental Consideration supporting this determination is available in the docket where indicated under ADDRESSES. We seek any comments or

information that may lead to the discovery of a significant environmental impact from this rule.

#### **G. Protest Activities**

The Coast Guard respects the First Amendment rights of protesters. Protesters are asked to contact the person listed in the FOR FURTHER INFORMATION CONTACT section to coordinate protest activities so that your message can be received without jeopardizing the safety or security of people, places, or vessels.

#### **List of Subjects in 33 CFR Part 165**

Harbors, Marine Safety, Navigation (water), Reporting and recordkeeping requirements, Security Measures, Waterways.

For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

#### **Title 33—Navigation and Navigable Waters**

##### **PART 165 -- REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS**

1. The authority citation for part 165 continues to read as follows:

**Authority:** 33 U.S.C. 1231; 50 U.S.C. 191; 33 CFR 1.05-1, 6.04-1, 6.04-6, and 160.5; Department of Homeland Security Delegation No. 0170.1.

2. Add § 165.T14-0172 to read as follows:

§ 165.T14-0172 Safety Zone; Pacific Ocean, Kilauea Lava Flow Ocean Entry on Southeast Side of Island of Hawaii, HI.

(a) Location. The safety zone area is located within the Captain of the Port (COTP) Zone (see 33 CFR 3.70-10) and it encompasses one primary area from the

surface of the water to the ocean floor at the Kilauea active lava flow entry into the Pacific Ocean on the southeast side of the Island of Hawaii, HI. The entry point of the lava does change based on flow; however, the safety zone will encompass all waters extending 300 meters (984 feet) in all directions around the entry point of lava flow into the ocean associated with the lava flow at the Kamokuna lava delta.

(b) Enforcement period. This rule is effective from September 28, 2017, through March 28, 2018.

(c) Definitions. As used in this section, “designated representative” means a Coast Guard Patrol Commander, including a Coast Guard coxswain, petty officer or other officer on a Coast Guard vessel or a Federal, State, or local officer designated by or assisting the COTP in the enforcement of the safety zones.

(d) Regulations. The general regulations governing safety zones contained in §165.23 apply to the safety zone created by this temporary final rule.

(1) All persons and vessels are required to comply with the general regulations governing safety zones found in this part.

(2) Entry into or remaining in this safety zone is prohibited unless authorized by the COTP Honolulu or his designated representative.

(3) Persons or vessels desiring to transit the safety zone identified in paragraph (a) of this section may contact the COTP Honolulu through his designated representatives at the Command Center via telephone: 808-842-2600 and 808- 842-2601; fax: 808-842-2642; or on VHF channel 16 (156.8 Mhz) to request permission to transit the safety zone. All safety zone transit requests must be in writing. If permission is granted, all persons and vessels must comply with the instructions of the COTP Honolulu or his designated

representative and proceed at the minimum speed necessary to maintain a safe course while in the safety zone.

(4) The U.S. Coast Guard may be assisted in the patrol and enforcement of the safety zone by Federal, State, and local agencies.

Dated: September 25, 2017.

M.C. Long,

Captain, U.S. Coast Guard,

Captain of the Port Honolulu.

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